United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Issued May 16, 1995

No. 93-7219

MARTIN W. BARBOUR,
PLAINTIFF-APPELLEE

v.

MARK H. MERRILL,
INDIVIDUALLY AND AS VICE PRESIDENT, SUPPORT SERVICES;
MEDLANTIC MANAGEMENT CORPORATION,
DEFENDANTS-APPELLANTS

GREGORY J. WALLING,
DEFENDANT-APPELLEE

and Consolidated Case No. 93-7223

ON APPELLANTS' SUGGESTION FOR REHEARING EN BANC

BEFORE: EDWARDS, *Chief Judge*; WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, *Circuit Judges*.

O R D E R

The Suggestion for Rehearing *En Banc* of appellants/cross-appellees has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the court *en banc,* that the suggestion is denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

A statement of Circuit Judge Williams concurring in the denial of rehearing *en banc,* joined by Circuit Judges Silberman and Ginsburg, is attached.

WILLIAMS, *Circuit Judge,* with whom SILBERMAN and GINSBURG, *Circuit Judges,* join, concurring in the denial of rehearing *en banc*: Although the evidence supporting an inference of discrimination seems to me thin to the point of virtual invisibility, such an intensely fact-bound issue is unsuitable for *en banc* review. I do not construe the panel opinion to read *St. Mary's Honor Ctr. v. Hicks,* 113 S. Ct. 2742 (1993), as saying that the factfinder is free to find discrimination *in every case* where the plaintiff has established a prima facie case and offered evidence sufficient to disprove the defendant's attempted rebuttal. The Court wrote:

> The factfinders' disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may* together with the elements of the prima facie case, suffice to show intentional discrimination.

Id. at 2749 (emphasis added). The word "may" is ambiguous. It might mean that the factfinder is completely free to find discrimination, in the sense that an appellate court could never reverse such a decision on the evidence. Alternatively, it might mean that in some cases the combination will be adequate to sustain a finding of discrimination, in others not, to be determined by the factfinder initially, and the appellate court on review, according to the usual principles. As I understand the panel opinion to adopt the latter view, I find the case to raise no question justifying an *en banc.*